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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Deferral of Licensing of MTA Commercial) PP Docket No. 93-253
Broadband PCS) ET Docket No. 92-100

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1996

Released: April 1, 1996

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed on July 21, 1995 by the National Association of Black Owned Broadcasters, Percy E. Sutton, and the National Association for the Advancement of Colored People (collectively "Petitioners").¹ Petitioners seek review of a June 23, 1995 *Order* by the Chief, Wireless Telecommunications Bureau ("the Bureau") denying two previous requests, one filed by Petitioners, to delay the licensing of all MTA license winners in the Commission's PCS A and B block auction until the future C block auction winners were ready to be licensed.²

¹ On August 4, 1995, Petitioners filed a *Motion for Leave to File Supplement to Application for Review* and a *Supplement to Application for Review* ("Supplement"). On August 24, 1995, Petitioners filed an *Erratum to Application for Review* ("Erratum").

² Deferral of Licensing of MTA Commercial Broadband PCS, *Memorandum Opinion and Order*, PP Docket No. 95-253, ET Docket No. 92-100, DA 95-1410, (Wireless Telecom. Bur., June 23, 1995) (*Stay Denial Order*).

II. BACKGROUND

2. On April 12, 1995, the Wireless Telecommunications Bureau issued an *Order* denying the "Emergency Motion to Defer MTA PCS Licensing" filed by Communications One, Inc. ("CommOne"), which sought to delay issuance of the 99 A and B block licenses in the 2 GHz Personal Communications Service ("broadband PCS").³ Two pleadings sought review of the *CommOne Order* and a stay of some or all grants of A and B block licenses until the conclusion of the broadband PCS C block auction. First, on May 12, 1995, CommOne, joined by GO Communications Corporation ("GO"), filed a petition for reconsideration of the *CommOne Order* and requested a stay of licensing of the three largest A and B block auction winners: AT&T Wireless PCS, Inc. ("AT&T Wireless"), PCS Primeco, L.P. ("PCS Primeco"), and WirelessCo, L.P. ("WirelessCo").⁴ Second, on May 12, 1995, Petitioners filed an application for review of the *CommOne Order* and a stay of all A and B block licensing.⁵ The Bureau denied both requests for relief.⁶ Although both parties sought Commission review, the Bureau determined that because CommOne/GO presented arguments not previously considered by the Bureau, Commission review would be inappropriate. In addition, the Bureau felt that it should reevaluate the arguments of all parties in light of the decision by the United States Supreme Court in *Adarand Constructors, Inc. v. Peña*.⁷

3. In the *Stay Denial Order*, the Bureau rejected Petitioners' claim that the decision to hold the C Block auction after the A and B block auction, combined with the absence of specific provisions for women and minorities in the A and B block auction, violated 47 U.S.C. § 309(j). The Bureau deemed Petitioners' stay request an untimely attempt to seek reconsideration of the Commission's rules adopted in PP Docket No. 93-253 with respect to the structure and sequencing of the PCS auctions.⁸ The Bureau noted that these rules were adopted in the *Fifth Report and Order* and reviewed on reconsideration in the *Fourth Memorandum Opinion and Order* in that docket, and that the deadline for reconsideration had

³ Deferral of Licensing of MTA Commercial Broadband PCS, 10 FCC Rcd 7780 (1995) (*CommOne Order*).

⁴ *Petition for Reconsideration by the Full Commission of Denial of Communications One, Inc. Emergency Motion to Defer MTA PCS Licensing*, filed May 12, 1995 ("CommOne/GO Petition").

⁵ *Application for Review and Request for Stay*, filed May 12, 1995 ("NABOB Petitioners' Application").

⁶ See *Stay Denial Order*, *supra* n.2; *Applications for A and B Block Broadband PCS Licenses*, PP Docket No. 253, ET Docket No. 92-100, DA 95-1411, (Wireless Telecom. Bur., June 23, 1995) (*A and B Block Order*). Petitioners have also filed an Application for Review of the *A and B Block Order*. We are dismissing the Application for Review of the A and B Block Order in a separate Order adopted today.

⁷ 115 S.Ct. 2097 (1995).

⁸ *Stay Denial Order* at 9.

long since passed.⁹ Finally, in addressing the stay request, the Bureau held that Petitioners and CommOne/Go failed to satisfy the *Holiday Tours* test for determining whether a stay is appropriate. The test includes four elements: (1) likelihood of success on the merits; (2) the probability of irreparable harm in the absence of relief; (3) the probability of harm to third parties if a stay is granted; and (4) whether a stay would serve or disserve the public interest.¹⁰

4. First, the Bureau determined that the parties were unlikely to prevail on the merits. It rejected the contention that licensing of the A and B Block winners should be delayed until the C Block winners were ready to be licensed. The Bureau concluded that the statute did not require the Commission "to promote diversity at the cost of delaying much needed service that could otherwise be provided to the public."¹¹ Second, the Bureau disagreed with Petitioners' claim of irreparable harm resulting from a headstart given to the A and B block winners. It noted that the Commission's decision to license the A and B blocks before the C block was not contingent upon any particular timetable or date for the C block auction. It also noted that the C block bidders could adjust their bids to account for any impact on the value of the C block licenses as a result of prior licensing of the A and B blocks.¹² Third, the Bureau concluded that a stay would significantly harm the A and B block winners. The Bureau noted that at the time of the *Stay Denial Order*, the A and B block winners had already paid \$1.4 billion to the United States Treasury as a downpayment (they paid the balance of approximately \$5.6 billion on June 30, 1995) and did not earn interest on their deposits. The Bureau further found that the winners had already invested significant funds in start-up costs. Finally, the Bureau concluded that the public interest would best be served by not delaying a new service to the public. It found that "rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B block winners being licensed ahead of auction winners in other PCS blocks."¹³ Accordingly, it refused to stay the licensing of the A and B block winners.

⁹ *Implementation of Section 309(j) of the Communications Act, Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order* 9 FCC Rcd 5532, 5546-5548, *recon. Fourth Memorandum Opinion and Order* 9 FCC Rcd 6858, 6863-6864 (1994).

¹⁰ *Stay Denial Order* at 10 (citing *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)).

¹¹ *Id.* The Bureau also rejected an economic analysis submitted by CommOne/GO purporting to show excessive concentration of PCS licenses. The Bureau determined that the study was flawed because, *inter alia*, it improperly assumed that the relevant product market was PCS, thus excluding the potential competitive impact of cellular and other wireless services from the model. *Id.* at 11. The Bureau also found that the analysis ignored the fact that licensing of the A and B blocks would substantially increase competition while staying the license grants would perpetuate a more highly concentrated market. *Id.*

¹² *Id.* at 13-14.

¹³ *Id.* at 15.

5. Petitioners filed the instant Application for Review on July 21, 1995.¹⁴ On August 24, 1995, Petitioners filed an Erratum to their application. On August 3, 1995, Petitioners filed an Emergency Motion for Stay with the United States Court of Appeals for the District of Columbia Circuit asking the court to stay issuance of the A and B block licenses (which had, in fact, been issued six weeks earlier) until the Commission was ready to license the winners in the C block auction as well. The Court denied the stay request on August 10, 1995.¹⁵

III. CONTENTIONS OF THE PARTIES

6. In their Application for Review, Petitioners repeat the same arguments rejected by the Bureau in the *Stay Denial Order*. They claim that the Commission failed to comply with its statutory mandate under 47 U.S.C. § 309(j) to provide adequate opportunities for minorities.¹⁶ The failure to provide specific incentives for minorities in the A and B blocks, according to Petitioners, has resulted in an unlawful territorial allocation.¹⁷ Petitioners also assert that they have met all of the requirements for obtaining a stay.¹⁸ They allege irreparable harm in the absence of a stay, including loss of access to capital, loss of base station cell sites, loss of access to distributors and retailers, and loss of market share.¹⁹ They also allege that the A and B block auction winners would not be harmed by issuance of a stay. Initially, Petitioners based this argument on the erroneous assumption that the A and B block winners had not received their licenses, and therefore would not be required to pay the 80% balance of their bids while a stay was in effect. In their Erratum Petitioners acknowledge that the Commission granted licenses to the A and B block winners on June 23, 1995 and that all of the auction winners timely paid their balances on June 30, 1995. Nevertheless, Petitioners continue to assert that this does not constitute irreparable harm to the A and B block winners. Petitioners also allege that all of the A and B block winners were on notice that the legality of their licenses was subject to challenge.²⁰ Petitioners further assert that they are likely to prevail on the merits of their claim that the Commission violated its

¹⁴ CommOne/Go did not contest the Bureau's order.

¹⁵ *National Association of Black Owned Broadcasters, Inc. v. Federal Communications Commission*, No. 95-1392 (D.C. Cir. August 10, 1995).

¹⁶ *Application for Review* at 4-6, 9-10.

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 15-16.

²⁰ *Erratum* at 1.

statutory mandate to disseminate licenses to and promote economic opportunity for minorities.²¹ Finally, Petitioners assert that a stay would serve the public interest by furthering the statutory obligation of the FCC to promote participation in PCS by minorities and other designated entities.²²

7. In a Supplement filed on August 4, 1995, Petitioners note that on July 27, 1995, the United States Court of Appeals for the District of Columbia Circuit stayed the C block auction.²³ Petitioners cite a statement by Chairman Hundt that this delay could push back the start of the C block auction for at least six months.²⁴ Petitioners allege that "[T]he longer the time period between the date of the A and B block licenses are issued and the date the C block licenses are issued, the greater and more profound this irreparable injury will become."²⁵

8. All of the parties filing oppositions allege that Petitioners have not satisfied the four prong test for a stay as set forth in *Holiday Tours*.²⁶ Western PCS Corporation ("Western") asserts that Petitioners would not succeed on the merits because they "misread the Congressional directives of 309(j)."²⁷ PCS PRIMECO, L.P. ("Primeco") disputes Petitioners' claim of excessive harm. It contends that the granting of a stay of the A and B block licensing would not remove the uncertainty concerning the timing of the C block auction nor would it remedy the problem of losing base station cell sites if indeed such a problem did exist.²⁸ Primeco argues that it is unclear how the A and B block licensees could preclude the eventual C block licensees from entering into distribution, resale, or other agreements and that Petitioners' claim of loss of market share was "purely speculative and unsupported by the

²¹ *Application for Review* at 19, (citing 47 U.S.C. § 309(j)).

²² *Id.* at 19.

²³ *Omnipoint Corporation v. FCC*, No. 95-1374 (D.C. Cir., July 27, 1995). Omnipoint Corporation objected to the Commission's extension of the 50.1% equity option to all applicants rather than to just women and minority applicants. This meant that the applicant's control group must hold at least 50.1% of the applicant's equity, and a single investor could hold the remaining 49.9% equity. Omnipoint argued that despite the facial neutrality of the rule, it violated the equal protection guarantee because business not owned by women or minorities did not have adequate time to take advantage of the rule change prior to the filing deadline for C block bidders.

²⁴ *Motion for Leave to File Supplement to Application for Review* at 3.

²⁵ *Supplement* at 3. The court dissolved the stay on September 28, 1995, and the C block auction began on December 18, 1995. *Omnipoint Corp. v. FCC*, No. 95-1374 (D.C. Cir. September 28, 1995).

²⁶ 559 F.2d 841 (D.C. Cir. 1977).

²⁷ *Western Opposition* at 24. We note that although Western's pleading references the caption pertaining to NABOB's *Application for Review* of our denial of its petition to deny, Western also raises arguments pertaining to the *Stay Denial Order* in the same pleading.

²⁸ *Primeco Opposition* at 10.

facts."²⁹ WirelessCo, L.P. and Phillieco, L.P. ("WirelessCo") dispute Petitioners' claim that a stay would not harm other parties. WirelessCo submits that it already paid over \$2.1 billion and PhillieCo paid \$85 million to the United States Treasury. WirelessCo indicates that it has taken significant steps toward providing PCS service, including entering into negotiations with equipment manufacturers for subscriber equipment, network equipment, switching equipment and cell sites. It also submits that it has hired employees in more than 20 cities and is presently negotiating facility leases in multiple locations.³⁰ Finally, WirelessCo argues that a stay would harm the public interest by delaying the realization by potential customers of the benefits of a new and innovative technology that would provide needed competition to incumbent cellular providers.³¹ Western raises the additional argument that Petitioners failed to comply with Section 1.115(b)(2) of the Commission's rules, 47 C.F.R. § 1.115(b)(2), pertaining to the requirements for filing applications for review by not stating the grounds upon which review should be granted and then citing the appropriate section.³²

IV. DISCUSSION

9. We agree with Western that Petitioners' Application for Review is procedurally defective and must be dismissed. Section 1.115(b)(2) of the Commission's rules, 47 C.F.R. §1.115(b)(2), requires applications for review to:

specify with particularity, from among the following, the factors which warrant Commission consideration of the questions presented:

- (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
- (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
- (iii) The action involves application of precedent or policy which should be overturned or revised.
- (iv) An erroneous finding as to important or material question of fact.

²⁹ *Id.* at 11.

³⁰ *WirelessCo Opposition* at 15.

³¹ *Id.* at 16.

³² *Western Opposition* at 5-6.

(v) Prejudicial or procedural error.

As we indicate in the companion order we are adopting today, Petitioners' pleading is defective because it fails to "specify with particularity" any of the above subsections as grounds for granting its Application for Review.³³ Petitioners' statement of general disagreement with the Bureau's *Stay Denial Order* will not suffice. Accordingly, we will dismiss petitioners' Application for Review. Although we are dismissing Petitioners' pleading, we also conclude on the merits that the Bureau correctly determined that Petitioners failed to meet the strict standards for obtaining a stay as requested here.

A. Likelihood of Success on the Merits

10. Petitioners' assertion that they will ultimately prevail on the merits is based upon their erroneous contention that the Commission has failed to comply with its statutory mandate.³⁴ That mandate includes, according to Petitioners, the obligation to disseminate licenses to a wide variety of applicants, including businesses owned by minorities.³⁵ Petitioners state that only way under Section 309(j)(3)(B) of the Act to implement this goal in a meaningful way is to delay licensing the A and B block auction winners until the Commission is ready to license the eventual C block auction winners. Otherwise, according to Petitioners, the value of the C block licenses will decrease as a result of the headstart granted to the A and B block licensees.³⁶ Nothing in the statute or legislative history requires such a result. In directing the Commission to establish bidding rules for PCS, Congress enumerated three other objectives in Section 309(j)(3) besides the one Petitioners cite: (1) development and rapid deployment of services with a minimum of administrative and judicial delay; (2) recovery for the public of a portion of the value of the spectrum; and (3) promoting efficient and intensive use of the spectrum.³⁷ In its auction rules, the Commission has properly balanced these objectives with the Section 309(j)(3)(B) goal of diversity of ownership by establishing PCS frequency blocks of varying sizes and service areas, reserving certain of these blocks for entrepreneurs, and creating special provisions for designated entities to bid for licenses in those blocks.³⁸ We do not believe the statute further requires the

³³ See *Chapman S. Root Revocable Trust*, 8 FCC Rcd 4223, 4224 (1993), where we held that procedurally defective applications for review will be dismissed.

³⁴ *Application for Review* at 12.

³⁵ *Id.* at 4, 9.

³⁶ *Id.* at 18.

³⁷ 47 U.S.C. §309(j)(3)(A), (C), and (D), respectively.

³⁸ Implementation of Section 309(j) of the Communications Act, Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5584-5588, *recon. Fifth memorandum Opinion and Order*, 10 FCC Rcd 403, 412-414 (1994). We note that the *Adarand* decision does not implicate the Commission's

Commission to promote diversity at the cost of delaying much needed service that could otherwise be provided to the public. A stay would serve the individualized interest of Petitioners rather than the broader public interest. The Commission is not at liberty to subordinate the public interest to the interest of "equalizing competition."³⁹ The Bureau correctly rejected Petitioners' argument that minorities will be unable to enter the PCS market because of illegal and unfair "territorial allocations" in violation of the antitrust laws by the A and B block bidders. In our companion order, we find that the Bureau correctly concluded that these allegations were too vague to meet the requirements of a petition to deny. We conclude here that Petitioners have not shown any likelihood of success on the merits.⁴⁰

B. Irreparable Harm

11. We agree with the Bureau that Petitioners' allegations of irreparable harm are speculative, and that Petitioners have overstated the "headstart" advantage of the A and B block winners over prospective C block winners. First, the A and B block winners themselves will have to compete with well-entrenched cellular companies, who enjoy a ten-year headstart over all broadband PCS in terms of business arrangements, market share, and investment in infrastructure.⁴¹ Furthermore, Petitioners' alleged injuries from loss of cell sites, loss of access to distributors, and difficulty in obtaining market share do not constitute "irreparable" harm of the type that would warrant grant of a stay.⁴² Nothing prevents Petitioners and other prospective C block bidders from entering into agreements that are contingent upon their winning the auction. As the Bureau noted, to the extent that late entry in fact disadvantages C block winners, that disadvantage will translate into lower prices at auction as bids are adjusted downward to compensate for any such detriment.⁴³ Finally, C block entrants may actually benefit from late entry because they will be able to evaluate the business strategies and performances of the A and B block winners.

decision to designate certain PCS spectrum blocks as entrepreneurs' blocks, because the Commission's entrepreneurs' block criteria are based on size, not race.

³⁹ *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) *quoting Hawaiian Telephone v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974).

⁴⁰ Although NABOB does not rely upon the economic data submitted by CommOne/GO, we agree with the Bureau's analysis in rejecting that data. *See Stay Denial Order* at 11.

⁴¹ *See Stay Denial Order* at 13.

⁴² *See Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.")

⁴³ *Stay Denial Order* at 13-14.

C. Harm to Others

12. The third prong of the *Holiday Tours* test is the potential harm a stay would cause to others. Petitioners acknowledge that the A and B block winners have paid over \$7 billion to the United States Treasury for their PCS licenses. Since winning the licenses, A and B block winners have also invested significant funds to cover start-up and development costs which they cannot begin to recoup until they are able to use their licenses to provide service.⁴⁴ In light of these considerations, we believe that a stay would cause significant harm to other parties.

D. Public Interest

13. Finally, we conclude that a stay of A and B block licensing would not be in the public interest. The Bureau correctly found that besides imposing a financial burden on the A and B block winners themselves, a stay would delay the introduction of new competition and new services to the public. Conversely, granting the licenses will further the Congressional directive to promote the development and rapid deployment of PCS for the benefit of the public with a minimum of administrative or judicial delay.⁴⁵ We continue to believe that the public interest in rapidly providing new competitive sources of wireless services outweighs any possible competitive harm that might result from the A and B block licensees being licensed ahead of auction winners in other PCS blocks.

V. CONCLUSION

14. For the reasons discussed above, we are dismissing Petitioners' Application for Review for failure to comply with Section 1.115(b)(2) of our rules. Although our action renders further discussion unnecessary, we agree with the Bureau's disposition of the issues Petitioners raised in their original stay request.

⁴⁴ See *Id.* at 14.

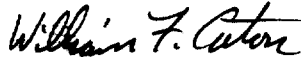
⁴⁵ 47 U.S.C. § 309(j)(3)(A).

VI. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and 47 C.F.R. §1.115(c)(2), the Application for Review filed by Petitioners on July 21, 1995, is DENIED.

16. IT IS FURTHER ORDERED that pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) the Motion for Leave to File Supplement to Application for Review filed by Petitioners on August 4, 1995, is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "William F. Caton".

William F. Caton

Acting Secretary